**Tentative Rulings for July 13, 2016**
**Departments 402, 403, 501, 502, 503**

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**There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)**

**15CECG01827** ***Alexander et al. v. Smith et al.*** **(Dept. 502)**

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**The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.**

**15CECG02999** ***Estate of Ann Hart v. Willow Creek*** **(Dept. 503) [Hearing continued to July 14, 2016 in Dept. 503]**

**16CECG00509** ***Robin Bebout v. McDonald's Restaurants of California, Inc.*** **is continued to Thursday, July 14, 2016 at 3:30 p.m in Dept. 503.**

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**(Tentative Rulings begin at the next page)**

# Tentative Rulings for Department 402

# Tentative Rulings for Department 403

03

**Tentative Ruling**

Re: ***Bank of Stockton v. Garcia***
Lead Case No. 12 CE CG 03902, Consolidated with Case No.'s 13 CE CG 00135 and 15 CE CG 01410

Hearing Date: July 13th, 2016 (Dept. 403)

Motion: Defendants John and Janie Garcia's Five Motions to Quash Subpoenas Served on Bank of America, Capital One, Cabela's Visa, Macy's, and Stoughton Davidson

**Tentative Ruling:**

To deny the motions to quash the subpoenas served on Bank of America, Capital One, and Cabela's Visa, without prejudice, as moot in light of the responding parties' refusal to respond unless there is a subpoena issued by a Nebraska court.

To deny the motions as to the subpoenas served on Macy's and Stoughton Davidson to the extent defendants seek to quash the subpoenas entirely. (Code Civ. Proc. § 1987.1, subd. (a).) However, the court intends to grant a protective order limiting the timeframe for the subpoenas, as the subpoenas are overbroad as to time. (*Ibid*.) The subpoena for Macy's will be limited to documents from January of 2012 to the present, and the subpoena served on Stoughton Davidson will be limited to documents from January of 2009 to the present.

To deny both parties' requests for monetary sanctions. (Code Civ. Proc. § 1987.2.)

**Explanation:**

The court intends to deny the motions to quash as to Bank of America, Cabela's, and Capital One, as they are apparently moot. According to counsel for Morris and Sharon Garcia, these entities have refused to produce any documents pursuant to the California subpoenas, and will not produce any documents until Morris and Sharon obtain a subpoena from a Nebraska court under Nebraska law. While defense counsel has not provided a declaration stating these facts, she does make this representation in her briefs, so the court finds that the motions to quash as to the subpoenas to Bank of America, Capital One and Cabela's are moot, and it will deny them without prejudice.

Next, with regard to the two remaining motions to quash as to Stoughton Davidson and Macy's, the court intends to deny the motions to the extent that they seek to entirely quash the subpoenas. However, the court intends to grant the motions to the extent they seek a protective order limiting the scope of the subpoenas, as the subpoenas are overbroad as to time.

Defendants contend that the subpoenas seek irrelevant information and documents, but their arguments regarding relevance simply repeat the same arguments they previously made in their demurrer to the complaint as well as their prior motions to quash. The court has already rejected these arguments in its ruling on the demurrer and motions to quash, and it will do so again here. As plaintiffs have alleged that they retained a membership interest in the LLC's even after the Bank obtained their economic interest, they would still have a right to inspect the financial records of the LLC's and obtain documents related to the businesses.

In any event, most of defendants' arguments relate to the merits of plaintiffs' claims, not to whether the subpoenas seek documents that are relevant to the subject matter of the action or reasonably calculated to lead to the discovery of admissible evidence, which is the proper standard for discovery of documents. (Code Civ. Proc. § 2017.010.) Here, the documents that plaintiffs seek are relevant to the subject matter of the action or reasonably calculated to lead to the discovery of admissible evidence, since plaintiffs have alleged that defendants engaged in mismanagement of the LLC's and misappropriated corporate assets. Thus, they are entitled to discover any financial documents of the LLC's that might support their legal claims, including charge accounts and accounting records of the companies.

Also, while defendants contend that their privacy rights would be violated if the records are disclosed, they have failed to show that they have any privacy rights in the financial records of the LLC's that outweigh the rights of the plaintiffs to discover information that is relevant to their claims. Defendants are parties to the action and have been accused of financial mismanagement and misappropriation of the LLC's assets, so financial documents related to the LLC's are clearly directly relevant to the plaintiffs' claims. In addition, plaintiffs are not seeking defendants' personal financial records, but only the records of the companies, so it is unclear how defendants' personal financial information might be disclosed by the subpoenas. Therefore, the court intends to disregard the defendants' privacy argument.

On the other hand, it does appear that the subpoenas are overbroad as to time. The subpoena to Stoughton Davidson requests all accounting documents of the companies for the last ten years, and the subpoena to Macy's has no limitation whatsoever as to time. However, plaintiffs do not explain why they need all documents related to the companies for such a large timeframe. Defendants contend that plaintiffs have no right to any documents prior to March of 2011, which is when plaintiffs filed for bankruptcy.

It is questionable whether plaintiffs have any right to documents prior to the foreclosure sale of the LLC's assets, which took place in 2012, since this seems to be when they are alleging that the mismanagement and misappropriation took place. Yet plaintiffs may be entitled to accounting documents for at least a few years before the sale, since plaintiffs are alleging that the members had a longstanding practice of using LLC assets to pay their tax liabilities. The best way for plaintiffs to prove that such a practice existed would be to obtain accounting documents for the years prior to the sale to show that they paid their taxes using the LLC's assets.

As a result, while the subpoenas are overbroad and should be limited, the court intends to allow plaintiffs to obtain accounting records from Stoughton Davidson from the period of 2009 to the present to allow them to investigate and prove their claim that the LLC's paid their taxes debts for the period prior to the sale. On the other hand, the court will limit the subpoena to Macy's to only the records from January of 2012 to the present.

Finally, the court intends to deny both parties' requests for monetary sanctions against each other. The motions as to Bank of America, Capital One and Cabela's are moot, but not necessarily without merit, so sanctions are not warranted against either party with regard to these subpoenas. Also, while the motions as to Stoughton Davidson and Macy's will be granted in part, they were not entirely successful and defendants raised a number of meritless arguments based on contentions that have already been rejected by the court in the past. Therefore, neither side is entitled to sanctions with regard to the Stoughton Davidson and Macy's subpoenas.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By: KCK on 7/12/16 .**

(Judge's initials) (Date)

# Tentative Rulings for Department 501

(30)

Re: ***Khaled Abualrejal v. Shogay Ahmed***

Superior Court No. 15CECG03604

Hearing Date: Wednesday July 13, 2016 (**Dept. 501**)

Motion: (1) Defendant Wells Fargo's Demurrer to Plaintiff's First Amended Complaint

(2) Defendant Wells Fargo's Motion to Strike Plaintiff's First Amended Complaint

**Tentative Ruling:**

To Order Demurrer off calendar.

To Order Motion to Strike off calendar.

Any challenges to the amended pleading must be raised by new motion(s).

**Explanation:**

If, after a demurrer is sustained with leave to amend, Plaintiff files an amended complaint, it is treated as a *new* pleading. Defendant is therefore entitled to respond to the amended pleading as he or she did to the original—including by filing another demurrer. (*Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1232.) Further, the filing of an amended complaint moots a motion directed to a prior complaint. (*JKC3H8 v. Colton* (2013) 221 Cal.App.4th 468, 477; *State Comp. Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1131; *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1054; *Perry v. Atkinson* (1987) 195 Cal.App.3d 14, 17-18.)

Here, Defendants: Shogay Ahmed, Cliffside Investments LLC, Ocean Waves LLC, Halim Saleh, Hulad Saleh, and Saleh Salehs' demurrer to Plaintiff's FAC was sustained on June 7, 2016. This Court granted leave to amend and on June 27, 2016, Plaintiff filed his Second Amended Complaint. Plaintiff's Second Amended Complaint is the *new* pleading and Defendant may respond to *it* as it would the original. Defendant's demurrer and motion to strike Plaintiff's prior complaint are moot.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By: MWS on 7/12/16 .**

(Judge's initials) (Date)

03

**Tentative Ruling**

Re: ***Rodriguez v. Urbar***
Case No. 16 CE CG 00344

Hearing Date: July 13th, 2016 (Dept. 501)

Motion: Defendant's Demurrer and Motion to Strike Portions of First Amended Complaint

**Tentative Ruling:**

To sustain the demurrer to the third cause of action in the first amended complaint without leave to amend, for failure to state facts sufficient to constitute a cause of action and uncertainty. (Code Civ. Proc. § 430.10, subd. (e), (f).)

To grant the motion to strike the allegations and prayer regarding punitive damages, with leave to amend. (Code Civ. Proc. §§ 435, 436.) To grant the motion to strike the prayer for attorney's fees, without leave to amend. (*Ibid*.)

Plaintiff shall serve and file his second amended complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

**Explanation:**

**Demurrer:** Plaintiff's third cause of action attempts to state a claim for "intentional tort", but it is unclear which intentional tort plaintiff seeks to allege. The cause of action is set forth on the standard form complaint attachment for intentional torts, but there is no label indicating which intentional tort the plaintiff alleges that defendant committed. Thus, the cause of action is uncertain, as it is impossible to determine which cause of action plaintiff seeks to allege.

Also, the facts in the attachment simply restate the same facts that support the negligence claims, namely that defendant drank alcoholic beverages to the point of intoxication and then drove his motor vehicle while impaired, thus causing the accident and injuring plaintiff. (Complaint, p. 6, ¶ IT-1.) There is no allegation that defendant intentionally caused the accident, or that he intended to harm plaintiff. While plaintiff does allege that defendant acted with willful and conscious disregard for other motorists, including plaintiff, this allegation does not show the kind of intentional conduct that would support any recognized intentional tort. Nor does plaintiff address the defendant's arguments regarding this cause of action or explain how he could amend the cause of action to state a valid claim. Therefore, the court intends to sustain the demurrer to the third cause of action for failure to state facts sufficient to constitute a cause of action and uncertainty. Furthermore, since plaintiff has not made any attempt to show how he could cure the defect by amending the complaint, the court intends to deny leave to amend the cause of action.

**Motion to Strike:** With regard to the prayer for punitive damages, plaintiff has not alleged sufficient facts to show that defendant acted with malice, fraud or oppression when he caused the accident. (Civil Code § 3294, subd. (a).) Courts have permitted plaintiffs to recover punitive damages against defendants who cause accidents while driving under the influence of drugs or alcohol. However, a plaintiff seeking punitive damages against a defendant who drives under the influence must still show not only that the defendant drove while intoxicated, but also that he was aware of the probable dangerous consequences of his actions when he chose to drink and drive.

For example, in *Taylor v. Superior Court* (1979) 24 Cal.3d 890, the California Supreme Court held that it was proper to allow a plaintiff to seek punitive damages against a defendant who caused the plaintiff's injuries while the defendant was driving under the influence of alcohol. "[A] conscious disregard of the safety of others may constitute malice within the meaning of section 3294 of the Civil Code. In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences." (*Id*. at pp. 895-896, internal citation omitted.) The Supreme Court also noted that, "while a history of prior arrests, convictions and mishaps may heighten the probability and foreseeability of an accident, we do not deem these aggravating factors essential prerequisites to the assessment of punitive damages in drunk driving cases." (*Ibid*; see also *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 86, holding that a plaintiff could seek punitive damages against a drunk driver who had struck him while he was walking his bicycle near a public park.)

However, defendant points out that the Legislature amended Civil Code section 3294, subdivision (a) in 1987, after the *Taylor* and *Dawes* decisions, to require a plaintiff seeking punitive damages to prove by clear and convincing evidence that defendant was guilty of "despicable conduct." Thus, plaintiff must not only prove that defendant acted with conscious disregard for the rights and safety of others, but also that defendant acted in a manner that is "base", "vile", or "contemptible." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.) "As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*Ibid*, internal citations omitted.)

Thus, merely showing that a defendant acted with reckless disregard for the safety of others is not enough. The defendant's conduct must be also be despicable, i.e. "'... so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.' " (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1210, internal citations omitted.) In *Lackner*, the Court of Appeal found that a snowboarder who accidently struck a skier could not be held liable for punitive damages, as there was no evidence that he acted intentionally or that his conduct was despicable. (*Id*. at 1210-1213.) However, *Lackner* was decided on summary judgment, not on a demurrer or motion to strike, so it is not necessarily helpful in analyzing the allegations needed to state a valid claim for punitive damages, as opposed to the evidence needed to defeat a summary judgment motion.

Here, while plaintiff will ultimately need to prove his allegations of malice by clear and convincing evidence of despicable conduct, at the pleading stage it is sufficient to allege that defendant acted with conscious disregard for the rights and safety of others by willfully driving under the influence with knowledge that such conduct posed an unreasonable danger to others.

In the present case, plaintiff has not alleged any specific facts to support his punitive damage claim, other than some conclusory allegations that defendant willfully drove while intoxicated and with knowledge of the risk that his conduct would injure others. He alleges no facts showing that defendant was aware of the dangers posed by driving under the influence, and that he chose to drive while intoxicated despite those dangers. He does alleges that "Defendant John Zaragoza" was driving on a suspended license at the time of the accident, and that he was only allowed to drive to and from his place of employment and to DUI classes. (FAC, p. 7, Exemplary Damages Attachment, 3rd Paragraph.) He also alleges that "John Zaragoza" had prior DUI's, which demonstrate an "unrepentant pattern of conscious disregard for the rights and safety of others." (*Ibid*.)

These facts might show a consciousness of the dangers of driving under the influence, since a person who has been arrested and convicted of driving under the influence would have necessarily be on notice of the dangerousness of such behavior. However, plaintiff's allegations are defective here, since they allege that "John Zaragoza", not defendant Ramon Urbar, was driving on a suspended license due to prior DUI's. While plaintiff claims that this was merely a typographical error, and that he meant to allege that Ramon Urbar had been convicted of prior DUI's, the mistake renders the allegations meaningless as against defendant Ramon Urbar. Therefore, the court intends to grant the motion to strike as to the punitive damages allegations and prayer, with leave to amend, and to order plaintiff to file an amended complaint with more detailed facts regarding the defendant's prior convictions, as well as any other relevant aggravating facts or circumstances regarding the accident.

Finally, the court intends to grant the motion to strike the prayer for attorney's fees from the FAC. Plaintiff relies on Code of Civil Procedure section 1021.4 to support his request for attorney's fees. (FAC, p. 3, ¶ 14.) Section 1021.4 states, "In an action for damages against a defendant based upon that defendant's commission of a felony offense for which that defendant has been convicted, the court may, upon motion, award reasonable attorney's fees to a prevailing plaintiff against the defendant who has been convicted of the felony." (Code Civ. Proc., § 1021.4.)

Here, however, there is no allegation that defendant has been charged with, much less convicted of, a felony related to the accident that forms the basis of the complaint. Thus, there is no basis for plaintiff to seek attorney's fees under section 1021.4. Nor has plaintiff cited any other facts or authorities that would allow him to recover attorney's fees here. Therefore, the court intends to grant the motion to strike the prayer for attorney's fees from the FAC, without leave to amend.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By: MWS on 7/12/16 .**

(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Funch v. Rocha***
Court Case No. 15CECG02313

Hearing Date: **July 13, 2016 (Dept. 501)**

Motion: Lithia FMF, Inc.'s Motion for Leave to File Cross-Complaint

**Tentative Ruling**:

To grant. (Code Civ. Proc. § 426.50.) Defendant is granted 10 days' leave to file the cross-complaint. The time in which the cross-complaint can be filed will run from service by the clerk of the minute order.

**Explanation:**

No opposition has been filed to this motion to file a compulsory cross-complaint. Courts have interpreted Code of Civil Procedure section 426.50 to require that a motion to file a compulsory cross-complaint during the course of the action must be granted unless the opposing party shows that moving party has acted in bad faith. (See *Silver Organizations Ltd. V. Frank* (1990) 217 Cal.App.3d 94, 98–99—even on "eve of trial," leave to file compulsory cross-complaint mandatory absent bad faith.) It does not appear that defendant acted in bad faith in not filing the cross-complaint at the time of its answer. It does not appear that plaintiff will be prejudiced in any way by the granting of this motion.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

**Tentative Ruling**
**Issued By: MWS on 7/12/16 .**
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: **Khosa v. Huff, et al.**

Case No. 15CECG02044

Hearing Date: July 13, 2016 (Dept. 501)

Motion: By Defendants Sandra Huff and Steven L. Shahbazian for Sanctions pursuant to Code of Civil Procedure §128.5.

**Tentative Ruling:**

To deny the motion without prejudice to bringing the motion at a more appropriate juncture.

**Explanation:**

[Note- there does not appear to be a reply brief in the Court's files for this motion.]

Defendants have made a motion pursuant to Code of Civil Procedure §128.5. Defendants assert that the Third Amended Complaint filed by Plaintiff falls under the parameters of Section 128.5 because, according to Defendants, the pleading attempts to make a claim for breach of contract for the sale of land on the basis of an oral agreement, and that the corresponding statute of frauds defense is not answered by any allegations of valid part performance. (Defendants' Memorandum of Points and Authorities at p.4.)

Section 128.5 was previously only applicable to cases filed prior to 1995, however, the statute was amended in 2015 to apply to cases filed after January 1, 2015, as this one is. As a result, prior case law is relevant in determining the scope of the current statute.

Section 128.5, subdivision (a) provides: "A trial court may order a party, the party's attorney, or both to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." The word "frivolous" is defined as "totally and completely without merit or for the sole purpose of harassing an opposing party." (Code Civ.Proc. §128.5, subd.(b)(1).)

Sanctions should be awarded only for the "most egregious of conduct" and in the "clearest of cases." (*Luke v. Baldwin-United Corp.* (1985) 167 Cal.App.3d 664, 669.)

An objective standard is applied in determining whether a lawsuit is frivolous: a lawsuit "indisputably has no merit only where any reasonable attorney would agree that the action is totally and completely without merit." (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 12 (internal quotations omitted).) Factors to be considered can include a lack of legal grounds for the pleading, a lack of evidentiary showing, and laches. (*Id.* at 12-15.)

Here, although the Court has issued a tentative ruling sustaining the demurrer to the Third Amended Complaint, the demurrer was sustained with leave to amend. This is because it is possible that Plaintiff has stated a claim for promissory estoppel and, moreover, that it is possible that Plaintiff could plead facts that estop Defendants from relying on the statute of frauds as a defense to the claim for breach of an oral contract for the sale of land. (*See Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1068-69.) Plaintiff may or may not be able to make the requisite factual allegations to support a promissory estoppel theory. Therefore, it is not, at this juncture, the "clearest of cases" as to whether Plaintiff's case is "without legal merit," nor has there been a showing of a complete lack of evidentiary support for Plaintiff's claims.

Defendants' alternative assertion that the Third Amended Complaint has been filed for the "sole purpose of harassing an opposing party" is based on the argument that Defendants have been forced to "confront and resist such allegations continuously over a period of nearly one year." (Memo of Points and Auth., p. 5.) The Court is mindful that the pleadings could have been drawn more precisely and thoroughly. However, it is still not clear that this is among the most "egregious of cases" of harassment, and so cannot grant the motion on this ground.

Therefore, the Court denies the motion without prejudice to the defendants' ability to make this motion at a later date.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By: MWS on 7/12/16 .**

(Judge's initials) (Date)

# Tentative Rulings for Department 502

(20) **Tentative Ruling**

Re: ***Gonzalez et al. v. Vemma Nutrition Company et al.***
Case No. 14CECG00134
***Alonzo et al. v. Vemma Nutrition Company et al.***
Case No. 14CECG01023
***Martinez v. Vemma Nutrition Co. et al.***
Case No. 14CECG01715
***Smith v. Union Pacific Railroad et al.***
Case No. 14CECG02314

Hearing Date: **July 13, 2016 (Dept. 502)**

Motion: Defendant Union Pacific Railroad's Two Motions for Summary Judgment

**Tentative Ruling:**

To deny the motion for summary judgment as to the Third Amended Complaint of Debra Smith and Stephen Smith.

To deny the motion for summary judgment as to the Second Amended Complaint of Sandra Gonzalez, Sarah Vega, Carlos Velasquez and Raymond Fernandez. (Code Civ. Proc. § 437c(c).)

**Explanation:**

In one motion defendant Union Pacific Railroad Co. moves for summary judgment of the Third Amended Complaint filed by plaintiffs Debra and Stephen Smith. As to Union Pacific, the TAC alleges that the railroad crossing was a dangerous condition that caused the accident.

In the other motion, Union Pacific moves for summary judgment of the Second Amended Complaint filed by Sandra Gonzalez and Sarah Vega. This pleading named Raymond Fernandez and Carlos Velasquez as nominal defendants, but they have since been realigned as plaintiffs. This complaint alleges the dangerous condition of the railroad crossing, but also that Union Pacific's employees operated the train in a negligent manner.

In both motions Union Pacific argues that the court lacks jurisdiction to determine the adequacy of the crossing warning devices, since Public Utilities Code section 1202 vests in the California Public Utilities Commission ("PUC") exclusive power to determine the manner of protection of railroad crossings. Thus, Union Pacific argues, the negligence claims pertaining to the design and safety devices at the crossing are

preempted. Union Pacific's Undisputed Material Fact ("UMF") numbers 1-9 set forth the facts supporting the preemption argument. All plaintiffs opposing the motions object to the evidence relied upon in support of these UMF – the PUC's responses to Union Pacific's requests for admissions. (See Schroeder Dec. Exh. 15.) These objections must be sustained.

Code of Civil Procedure section 2033.410, subdivision (b) provides, "[a]ny admission made by a party under this section is binding *only on that party* and is made for the purpose of the pending action only. It is not an admission by that party for any other purpose, and it shall not be used in any manner against that party in any other proceeding." (Emphasis added.) "Admissions to RFAs are preclusive only as to the admitting party, and only for purposes of the pending action." (Cal. Practice Guide: Civ. Proc. Before Trial (TRG 2016) ¶ 8:1393, citing Code Civ. Proc. § 2033.410(b).) Admissions are not evidence, but "a waiver of proof of a fact by conceding its truth." (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271.) The discovery device is merely a mechanism "to eliminate the need for proof ....' " (*St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 774–775.) Union Pacific has cited to no authority in support of the proposition that one party's admissions can be used as evidence against another party, and in particular against a party who is (or in this case, was) adverse to the party making the admission. The objections to the PUC's responses to the requests for admission are sustained.

Union Pacific errs by failing to produce admissible evidence with proper foundation in support of its UMF 1-9. Without any admissible for these proffered facts, the preemption argument lacks the necessary evidentiary support. Accordingly, the court must find that Union Pacific does not meet its threshold burden on this issue. The burden does not shift to plaintiffs to raise a triable issue of fact.

The only other argument raised by Union Pacific that would be dispositive of all claims by plaintiffs attacks the element of causation. Paragraph 13 of the declaration of Brian Heikkila (an expert in railroad safety and operating procedures) is the only evidence cited to by Union Pacific in support of the contention that "Plaintiffs cannot present anything more than pure speculation that the collision would not have occurred if the crossing were oriented differently." Mr. Heikkila's declaration does not support this conclusion. He never discussed the layout or safety features (or lack thereof) of the crossing itself. His declaration does not touch on whether Michaela Smith was negligent or was the sole cause of the accident. He really only addressed the warnings issued by the train itself and the actions of the engineer or trail personnel. Union Pacific does not meet its burden of negating the element of causation. The burden does not shift to plaintiffs to show the existence of triable issues of fact.

The Gonzalez and Vega complaint (case no. 14CECG00134) includes allegations that the Smith complaint does not – the train was negligently operated.

Union Pacific argues that there is no evidence to support the allegations that its freight engineer, Romel Green, was negligent in his operation of the train, whether it be the quality of his lookout, provision of warnings of his approach, sounding of the horn, or his speed.

However, since Union Pacific fails to meet its burden on the preemption and causation arguments, the motion must be denied, *even if* Union Pacific established that there are no triable issues of fact regarding negligent operation. Union Pacific only moved for summary judgment. Summary judgment lies only where the opponent has *no case at all*. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1215 fn. 12 [summary judgment appropriate where defendants establish an affirmative defense as to *all claims* against them].) A court cannot grant summary adjudication where the only motion noticed for hearing is for summary judgment. (*Maryland Cas. Co. v. Reeder* (1990) 221 Cal.App.3d 961, 974 fn. 4.) Since the motion fails to dispose of the "dangerous crossing" aspects of the second, third and fourth causes of action, Union Pacific cannot obtain summary judgment.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**
**Issued By: DSB on 7/11/16.**
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Ochoa v. DiSalvo et al.***
Superior Court Case No. 15CECG00098

Hearing Date: **July 13, 2016 (Dept. 502)**

Motion: Motion for Leave to File Third Amended Answer

**Tentative Ruling:**

To deny.

**Explanation:**

Defendants have not filed any papers in connection with the July 13, 2016 hearing. Even assuming that the papers filed on April 26, 2016 are intended to serve as the moving papers for this hearing, there is no indication that defendants have given notice to plaintiff of the hearing as required by Code Civ. Proc. § 1010; Cal. Rules of Court, Rule 3.1110.)

In moving to amend a pleading, the moving party "must" file a declaration that specifies: (1) the effect of the amendment, (2) why the amendment is necessary and proper, (3) when the facts giving rise to the amended allegations were discovered, and (4) the reasons why the request for amendment was not made earlier. (Cal. Rules of Court, Rule 3.1324(b).)

While counsel filed the required declaration, the declaration is not signed as required by Code of Civil Procedure section 2015.5.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**
**Issued By: DSB on 7/11/16.**
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Reintjes et al. v. Lynott et al.***, Superior Court Case No. 16CECG00338

Hearing Date: **July 13, 2016 (Dept. 502)**

Motion: Demurrer to First Amended Answer

**Tentative Ruling:**

To take off calendar in light of demurring parties' failure to comply with Code Civ. Proc. § 430.41.

**Explanation:**

Code of Civil Procedure section 430.41 provides:

> (a) Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer.

Demurring parties did not meet and confer "in person or by telephone," and apparently made no effort to do so. Due to the failure to comply with these statutory requirements, the demurrer is off calendar. Counsel also failed to file the declaration required by subdivision (a)(3), stating the means by which the parties met and conferred, and that they failed to reach an agreement resolving the objections raised in the demurrer.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**
**Issued By: DSB on 7/11/16.**
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***City of Fresno v. Occhionero***
Court Case No. 15CECG01908

Hearing Date: **July 13, 2016 (Dept. 502)**

Motion: City of Fresno's Motion to Fix Attorney's Fees in Contempt Proceeding (Code Civ. Proc. § 1218, subd. (a).)

**Tentative Ruling**:

To grant, with attorney's fees fixed at $16,560.

**Explanation:**

Fees are authorized by Code of Civil Procedure section 1218, subdivision (a). The statute's use of the phrase "in connection with the contempt proceeding" does not mean only with regard to the *hearing*, but concern all fees generated in connection with the *proceeding*. Contempt proceedings are considered separate and distinct from the action within with the contempt proceeding occurs. (Code Civ. Proc., §§ 1211 and 1218; *Reliable Enterprises, Inc. v. Superior Court* (1984) 158 Cal.App.3d 604, 616.) Plaintiff has carefully limited the time for which fees are sought, and all charges were incurred in connection with the contempt proceeding. The supplemental memoranda and evidence filed by plaintiff during the course of the proceeding were reasonable and necessary. The time Mr. Rubin spent in deposing Mr. Occhionero and in preparing witnesses defendants stated they were going to call at the contempt hearing was reasonable, and reasonably incurred.

A post-contempt-hearing motion for attorney's fees is authorized by Code of Civil Procedure section 1033.5. (*Id.*, subds. (a)(10)(B) and (c)(5).) Defendants were clearly put on notice that plaintiff intended to ask for fees. The hourly rate charged by Mr. Rubin is reasonable.

Defendants' arguments as to mitigating circumstances are not compelling or persuasive. They admit they were not "literally complying" with the court's prior order, and in fact what they term their "active attempts" at compliance—i.e., their insistence on continuing to sell material rather than simply paying to have it removed, when it was proven they had the financial ability to do so—was a key reason the court found them in contempt.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

**Tentative Ruling**
**Issued By: DSB on 7/11/16.**
(Judge's initials) (Date)

# Tentative Rulings for Department 503